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No.

In The

Supreme Court of the United States

KENNETH PIETROWSKI, WILLIAM BURRITT, WILLIAM COONS, DEBORAH DAVIS, CHARLES HOBBS, CHARLES MADDALOZZO, AND JOHN WILLIAMS,

Petitioners,

v.

SALLY L. CONKRIGHT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcalá Park
Warren Hall
San Diego, CA 92110
(619) 260-2347

BRENDAN S. MAHER
Counsel of Record
PETER K. STRIS
STRIS & MAHER LLP
1920 Abrams Pkwy, #430
Dallas, Texas 75214
(214) 224-0091

Attorneys for Petitioners

December 23, 2008

Becker Gallagher · Cincinnati OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

This litigation, which began in 1999, involves over 100 plaintiffs – each of whom is an employee or former employee of the Xerox Corporation ("Xerox"). Plaintiffs allege that Xerox and other respondents' use of an illegal accounting method has deprived them of substantial pension benefits. In 2006, the Second Circuit agreed with plaintiffs. *Frommert et al. v. Conkright et al.*, 433 F.3d 354 (CA2 2006) (holding that respondents had violated ERISA's notice and anti-cutback provisions through use of a "phantom account").

Since the inception of the litigation, Xerox has from time to time initiated mass layoff programs wholly unrelated to this pending litigation; in connection with these mass layoffs, all terminated employees were offered a severance package in exchange for signing a boilerplate release of legal claims. This petition is brought by 7 plaintiffs who signed this boilerplate release.

The Question Presented is:

In determining whether an individual has "knowingly and voluntarily" waived a claim to pension benefits by signing a boilerplate release, does ERISA require consideration of the specific circumstances under which the individual signed the release?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs-Appellees-Petitioners:

Kenneth W. Pietrowski, William M. Burritt, William F. Coons, Deborah J. Davis, Charles Hobbs, Charles J. Maddalozzo, and John A. Williams

Plaintiffs-Appellees:

Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo, Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. Mccoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. Mcmillan, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Zabinski, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Brenda H. Mcconnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Sr., Claudette M. Long, Dale

Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Crater, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, Crystal Thornton, Charles R. Drannbauer, Janice Ross Heiler, Thomas F. Mcgee, Vincent G. Johnson, F. Colt Hitchcock, Ronnie Tabak, Martha Lee Taylor, Charles Willette and Richard J. Glikin,

Defendants-Appellants-Respondents:

Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox Corporation Pension Plan Administrator, Lawrence M. Becker, Xerox Corporation Pension Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan and Xerox Corporation, A New York Corporation,

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Kenneth Pietrowski, William Burritt, William Coons, Deborah Davis, Charles Hobbs, Charles Maddalozzo, and John Williams (collectively "the Release Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for Second Circuit that their claims in this litigation were extinguished when they signed general releases in connection with the termination of their employment at Xerox.

OPINIONS BELOW

The opinion of the Second Circuit (Pet. App. 1a-22a) which gives rise to this petition is published at 535 F.3d 111. On August 7, 2008, the Release Petitioners filed a petition seeking rehearing and rehearing *en banc*. The order denying that petition (Pet. App. 60a-61a) is unpublished. The order and opinion of the district court holding that the releases at issue were unenforceable as a matter of law is published at 472 F.Supp.2d 452.

JURISDICTION

The Second Circuit issued its opinion on July 24, 2008. (Errata were filed on October 6, 2008). It denied a timely petition for rehearing and rehearing *en banc* (Pet. App. 60a-61a) on September 25, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Income Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, provides in pertinent part:

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds *** that the continued well-being and security of millions of employees and their dependents are directly affected by [benefit] plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; *** that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; *** and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

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STATEMENT OF THE CASE

1. Few statutes are more significant to a greater number of Americans than ERISA. At recent count, ERISA pension plans held several trillion dollars in

assets,[1] while ERISA welfare plans provide health insurance for over 132 million people.[2] In the words of Congress, "[t]he primary purpose of [ERISA] is the protection of individual pension rights."[3]

The crux of the dispute in this litigation is that respondents violated ERISA when the Xerox Retirement Income Guarantee Plan (the "Xerox Plan") dramatically under-calculated pension benefits due to *rehired* employees. In 1999, many affected Xerox employees or former employees filed suit against respondents in the District of Connecticut; in 2000 the

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[1] *See* John MacDonald, *"Traditional" Pension Assets Lost Dominance a Decade Ago, IRAs and 401(k)s Have Long Been Dominant*, EMP. BENEFIT RES. INST., February 3, 2006, *available at* http://www.ebri.org/pdf/publications/facts/fastfacts/fastfact020306.pdf.

[2] *See* William Pierron and Paul Fronstin, *ERISA Pre-emption: Implications for Health Reform and Coverage*, EMP. BENEFIT RES. INST., February 2008, p. 11, *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_02a-20082.pdf.

[3] H.R. Rep. No. 93-533 (1973), reprinted in 1974 U.S.C.C.A.N. 4639 (emphasis supplied). *See also* 120 Cong. Rec. 29,935 (1974) (ERISA is a "pension bill of rights") (statement of Sen. Javits); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983) (the purpose of ERISA is to "promote the interests of employees and their beneficiaries in employment benefit plans"); Jay Conison, *Suits For Benefits Under ERISA*, 54 U. PITT. L. REV. 1, 3 (1992) ("The central policy of * * * ERISA * * * is that employees should receive the pensions and other benefits they were led to believe they would get."). *See generally* James A. Wooten, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 A POLITICAL HISTORY (University of California Press 2005) (discussing history and purpose of ERISA).

matter was transferred to the Western District of New York (the "Benefit Litigation").

This is the second time the litigation has reached the Second Circuit. In 2005, after an adverse district court ruling, the Benefit Litigation plaintiffs appealed to the Second Circuit to determine whether the Xerox Plan's use of a "phantom account" offset to calculate plaintiffs' benefit entitlement was permissible under ERISA. On January 6, 2006, the Second Circuit held that Xerox had violated ERISA's notice and anti-cutback provisions through use of a "phantom account" method of calculating benefits. *Frommert v. Conkright*, 433 F.3d 254, 257 (CA2 2006) ("Frommert I"). The matter was remanded to the district court to determine, *inter alia*, the proper method for calculating plaintiffs' pension benefits. *Id.*

On July 24, 2008, the Second Circuit issued its second opinion in the Benefit Litigation, which gives rise to this petition. Pet. App. 1a-22a. The court of appeal's opinion addressed two issues: (1) did the district court select an appropriate methodology for calculation of the plaintiffs' pension benefit entitlement (the "methodology issue")? Pet. App. 9a-15a. And (2) did the district court correctly conclude that the execution of boilerplate release forms (as part of a reduction in Xerox's workforce that was wholly unrelated to the Benefit Litigation) did not extinguish pension claims in this litigation (the "release issue")? Pet. App. 15a-22a. As explained herein, the Question Presented pertains only to the release issue. The pertinent facts are as follows:

2. Xerox periodically terminates large groups of employees pursuant to voluntary reduction in force

("VRIF") or involuntary reduction in force ("IRIF") programs. These mass layoffs are governed by Xerox policy, which provides for "salary continuance" (*i.e.*, severance) in consideration for the affected employee signing a "general release" of claims against Xerox.[4] The amount of severance given to each employee who is terminated as part of a VRIF or IRIF varies only with the salary level and seniority of that employee. The VRIF/IRIF general release, a form used for *all* employees participating in force reduction programs, is a boilerplate release intended to extinguish claims arising from employment termination.[5]

The Release Petitioners are among a group of approximately twenty plaintiffs who (while the Benefit Litigation was pending) signed a general release in connection with a workforce reduction. The general release forms signed by the Release Petitioners make no specific mention of the Benefit Litigation.[6] And the

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[4] *Defendants' Local Rule 56 Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried*, ¶ 11 (Pet. App. 77a) ("Defendants' Rule 56 Statement"). This document was included in the record before the court of appeals, A1045-A1050. (Hereinafter, all references to pages in that record will take the form of "A____".)

[5] Pet. App. 42a-43a (the documents at issue are "standard release forms given to all employees who choose to participate in a RIF, and are aimed at foreclosing the possibility of the employee's later assertion of claims relating to his termination in the RIF **** [T]here is no suggestion that plaintiffs' claims in this case***were being waived.").

[6] Pet. App. 42a (where the district court notes that the general releases "omi[t] any mention" of the Benefit Litigation and "do not appear to have anything to do with this litigation"). *See, e.g.*, the

existence of the Benefit Litigation had absolutely no effect on the amount of severance offered to the Release Petitioners. Indeed, respondents candidly admit they had no involvement in the force reduction severance/release process.[7]

3. In the district court, former counsel for the Release Petitioners sought a determination that, as a matter of pure contract interpretation, the general releases were unenforceable against all Benefit Litigation plaintiffs.[8] Attention was focused on language in the general release that appeared facially contradictory.[9]

Agreeing with former counsel for the Release Petitioners, the district court determined that the ambiguity of the releases' language precluded their enforceability against *all* Benefit Litigation plaintiffs.

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general release form of Release Petitioner Charles Hobbs, signed December 7, 2005 ("Hobbs Release"), Pet. App. 62a-67a. The releases of the other Release Petitioners were also before the court of appeal, but are in pertinent part identical to Mr. Hobbs' release.

[7] Pet. App. 77a (Defendants' Rule 56 Statement, ¶12).

[8] Pet. App. 36a ("Plaintiffs contend that the releases are ambiguous in certain respects, and therefore unenforceable.").

[9] Paragraph three of the general release purports to release "any and all claims," while paragraph five indicates that the consideration for the release was "in addition to anything of value to which I am entitled by law or Xerox policy." Pet. App. 38a-39a (reciting release language); *see also* Hobbs Release, Pet. App. 62a-67a. Thus, paragraph three seemingly waives—while paragraph five seemingly preserves—anything to which an employee is entitled, including any claims that he or she had asserted in the Benefit Litigation. Pet. App. 38a-40a.

In light of this legal determination, no individualized inquiry was conducted regarding the individual circumstances under which each Release Petitioner had signed the general release form. Respondents appealed, *inter alia*, this particular ruling by the district court. Specifically, respondents argued that the language in the release was a "plain and simple statement [that] puts sophisticated and unsophisticated litigants on an equal footing, adds certainty to * * * settlement negotiations and agreements, and adequately notifies plaintiffs that they are releasing all possible claims."[10]

After briefing and argument, the Second Circuit reversed the district court on the release issue. Pet. App. 22a. ("As the District Court's interpretation of the release forms is incorrect, it cannot stand."). The court of appeals did not have any individualized facts before it regarding the circumstances under which each releasor signed the release. Yet, instead of remanding the case to the district court, the court of appeals categorically held that the general release extinguished the claims in this litigation of all who had signed it—except for those plaintiffs who specifically modified their form prior to execution. Pet. App. 22a. ("Unless the release form at issue specifically exempted this litigation as noted above, the releases signed by certain Plaintiffs-Appellees are enforceable.").[11] The Second Circuit's ruling rested

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[10] Respondents' Brief Before the Second Circuit, p. 20, *Frommert v. Conkright*, 535 F.3d 111 (CA2 2008).

[11] A few plaintiffs modified the general release to explicitly "carve-out" the Benefit Litigation. Pet. App. 15a, n.3. The Second Circuit

entirely on facts true of the releasor group as a whole, *i.e.*, all releasors were (formerly) represented by the same lawyer, had the same amount of time to review the release, and had received salary continuance to which they were not otherwise entitled. *Id.*

The Release Petitioners timely filed a petition for rehearing and rehearing *en banc*. On September 25, 2008, the Second Circuit denied the request for rehearing and rehearing *en banc*. Pet. App. 60a-61a.

This petition followed.

REASONS FOR GRANTING THE WRIT

Even respondents must concede that the Question Presented is one of exceptional importance. If not, they will need to repudiate the claims of their own *amicus*, the Business Roundtable, who informed the court of appeals below that the release issue presented "an issue of fundamental concern."[12]

Prior to the Second Circuit's decision below, there was broad consensus that the release of ERISA claims imposed upon the courts a duty to strictly scrutinize whether the releasing party acted voluntarily and with the knowledge that he or she was giving up the pension claims at issue. *Sharkey v. Ultramar Energy*

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upheld the district court's determination that such "carve-out" releases did not bar Benefit Litigation claims. *Id.*

[12] *See* Brief of the Business Roundtable as *Amicus Curiae* before the Second Circuit in Support of Defendant-Appellants Sally Conkright, *et al.*, at 9, *Frommert v. Conkright*, 535 F.3d 111 (CA2 2008) ("Roundtable Br.").

Ltd., Lasmo PLC, Lasmo (A UL Ltd.), 70 F.3d 226, 231 (CA2 1995) (close scrutiny required to ensure ERISA waiver is "knowing and voluntary"). Such strict scrutiny required more than a careful reading of the release agreement; it required individualized fact-finding into the circumstances of a particular plaintiff's signing of a release. *See, e.g., Finz v. Schlesinger*, 957 F.2d 78, 81 (CA2 1992) ("validity of an individual's waiver of pension benefits is subject to closer scrutiny than his or her waiver of general contract claims"); *Leavitt v. Northwestern Bell Telephone Co.*, 921 F.2d 160, 162 (CA8 1990) (listing the individual circumstances a court "must consider" when evaluating an ERISA release).

In deciding the Question Presented, the court of appeals departed from the well-settled individualized standard and created a new "group" standard for assessing the enforceability of a release of ERISA claims. This new standard cannot be reconciled with ERISA. It undermines the objective of carefully scrutinizing pension waivers, which is to ensure that a particular individual actually knew that he or she was relinquishing pension benefits earned over a lifetime—the very benefits ERISA was enacted to protect. *See* 29 U.S.C. § 1001 (ERISA's purpose is to provide "safeguards" and "minimum standards" to ensure the "equitable character" of benefit plans). Application of this standard will be often be outcome determinative, as it was in this case. Further review by this Court is warranted.

I. THE QUESTION PRESENTED IS ONE OF EXCEPTIONAL IMPORTANCE.

1. A release is the relinquishment of a claim (whose value is often uncertain) in return for something of value. Because a release may forever bar an otherwise meritorious claim, courts are careful to ensure—in any context—that the releasing party relinquished the claim knowingly and voluntarily. *Jordan v. Guerra*, 23 Cal.2d 469, 476 (Cal. 1943) (enforcement of release "demands * * * a full understanding on the part of the person injured as to his legal rights") (internal quotation and citation omitted).

This requirement is of particular importance in the ERISA setting where Congress intended that pension benefits enjoy heightened protection; accordingly, waivers of ERISA pension claims are strictly scrutinized. *See, e.g., Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 587 (CA1 1993) ("heightened scrutiny [is] applied to waiver of rights accrued in ERISA pension plans"); *Sharkey*, 70 F.3d at 23 (close scrutiny required to ensure ERISA waiver is "knowing and voluntary").[13]

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[13] As this Court has itself noted, ERISA is modeled on trust law. *See, e.g., Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law."). *See also* John H. Langbein, *What Erisa Means By "Equitable": The Supreme Court's Trail Of Error In Russell, Mertens, And Great West*, 103 COLUM. L. REV., 1317, 1321-38 (2003) (describing ERISA as a "regime of federal trust law"); Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1108 (1988)("The drafters of ERISA intended to 'apply rules and

2. Prior to the decision below, the courts of appeals (including the Second Circuit) had widely recognized that such enhanced scrutiny requires analysis of all salient factual circumstances of the signing of a release; that legal standard is often called the "totality of the circumstances" test.[14] *Laniok v. Advisory Committee of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1367 (CA2 1991). A non-exhaustive list of factors considered is:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff

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remedies similar to those under traditional trust law to govern the conduct of fiduciaries.'"). It is black-letter trust law that "in the case of a release of a fiduciary, special requirements are set by the courts." G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 943, at 475-80 (rev. 2d ed. 1982).

[14] The individualized "totality of the circumstances" test is also used in connection with assessing waivers made of other remedial rights, such as the rights conferred under federal anti-discrimination statues. In describing the quality and aim of the test, the Third Circuit has explained:

> [T]he inquiry into the validity of a release of discrimination claims *does not end with the evaluation that would be applied to determine the validity of a contract*. In light of the strong policy concerns to eradicate discrimination in employment, a review of the totality of the circumstances, *considerate of the particular individual* who has executed the release, is also necessary.

Coventry v. U.S. Steel Corp., 856 F.2d 514, 522-523 (CA3 1988) (emphasis supplied). *See also Torrez v. Public Service Co. of New Mexico, Inc.*, 908 F.2d 687, 690 (CA10 1990) ("While evaluation of the language of the contract is necessary to determine the validity of the waiver of discrimination claims, our inquiry cannot end there.") Such reasoning applies with equal force to ERISA.

> had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney * * * and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. See also Leavitt, 921 F.2d at 162.

This well established standard is self-evidently an individualized one designed to apply to *single* releases that come before the court. In other words, it prompts a plaintiff-specific inquiry into the facts underlying the signing of the purported release by a specific plaintiff. *See, e.g., Smart v. Gillette Company Long Term Disability Plan*, 70 F.3d 173, 181-182 (CA1 1995) (release inquiry is "fact-intensive" and "every case is *sui generis*")[15]; *Finz v. Schlesinger*, 957 F.2d 78, 82 (CA2 1992) ("an *individual* can waive his or her right to participate in a pension plan governed by ERISA only if his or her waiver is made knowingly and voluntarily.") (internal quotations omitted) (emphasis supplied).

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[15] *See also Smart*, 70 F.3d at 181:

> Generally, no single fact or circumstance is entitled to talismanic significance on the question of waiver. Only an inquiry into the totality of the circumstances can determine whether there has been a knowing and voluntary relinquishment of an ERISA-protected benefit. For that reason, every case is *sui generis*.

3. In the instant case, the litigation involves a *group* of over twenty releasors, each having signed near-identical boilerplate releases in conjunction with mass layoffs, but otherwise whose differentiated individual circumstances were largely unknown to the court of appeals. As explained above, the district court below had found the language of the release to be so unclear that it concluded as a matter of law that such a release could not bar the claims of *any* Benefit Litigation plaintiff.[16] Indeed, the Release Petitioners' trial counsel had not introduced individualized evidence; he argued that the releases were unenforceable by dint of the release's language, *no matter what the individual circumstances of the signatory plaintiff*:

> [The] essential relief sought by plaintiffs' motion is not a summary judgment but rather a judgment declaring that, as a matter of law, the Xerox general release is unenforceable * * * * The key point is the proper application and interpretation of [a particular provision] of the release.[17]

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[16] Pet. App. 40a ("the releases are at the very least ambiguous as to what the employee was giving up in exchange for salary continuance****[and] create some doubt about whether the release truly covered" the Benefit Litigation claims); Pet. App. 45a ("the ambiguity of the scope of the release***should not be resolved against plaintiffs.").

[17] A766 (Plaintiffs' Memorandum of Law in Further Support of the Plaintiffs' Motion Regarding Open Issues and in Opposition to the Defendants' Cross-Motion for Summary Judgment, p. 23).

The Second Circuit did not agree with the trial court that the release language was ambiguous; it found that the relevant language "provided only that the consideration for the release, *i.e.*, the salary continuance, did not replace any benefits, including pension benefits, to which the employee was already entitled." Pet. App. 20a. Yet the clarity of the agreement's language is only one part of the "totality of the circumstances" test; application of that standard requires individualized determinations about the *remaining* salient circumstances of the release signing of each Release Petitioner.[18] The court of appeals conducted no such determination. Nor could it have; the record was barren of particularized evidence.

4. Instead, the court of appeals effectively constructed a new "group" standard for evaluation of the validity of ERISA releases where, when evaluating the enforceability of a large number of form releases, it determined that sufficient general facts (*i.e.*, common language in the boilerplate document, common representation by the same counsel, etc.) moots inquiry into the particular circumstances

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[18] *Cf. Puentes v. United Parcel Service, Inc.*, 86 F.3d 196, 198 (CA11 1996) (in non-ERISA release case using similar "totality of circumstances" factors, court reversed summary judgment based on individualized factors beyond clarity of release language and releasors' business experience.); *Bledsoe v. Palm Beach County Soil and Water Conservation Dist.*, 133 F.3d 816, 820 (CA11 1998) ("The district court should not have summarily adopted a decision from another case, *even though it dealt with the exact same release form*. Each factor should be independently analyzed.") (emphasis supplied).

attending each individual releasor's execution of the release.[19]

Indeed, no difference among the Release Petitioners was considered by the Second Circuit's new group standard. Such is consistent with the philosophy urged upon the court by respondents and their *amicus*. In its *amicus* filing below, the Business Roundtable explained that the language of the release was "clear and unequivocal" to the extent that "[i]f such language 'were found to be an inadequate predicate for an effective waiver," the courts 'would be hard pressed to

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[19] The distinction between the individualized standard and the group standard is best illustrated by an example:

Assume two Releasors, both of whom are salaried employees represented by counsel, sign general releases. Releasor A is a Xerox employee who has never reviewed contracts during her professional tenure at Xerox; who knows that another plaintiff recently signed a modified release "carving-out" the Benefit Litigation yet still received full severance; who has received noncommittal answers from her lawyer about the effect of the release on his Benefit Litigation claim; who has heard from a Human Resources employee at Xerox that the general release "has nothing to do with the Benefit Litigation lawsuit"; and who knows of co-employees who are not members of the Benefit Litigation and who were offered the exact same severance/release deal.

Releasor B served as in-house counsel at Xerox; knows of another Benefit Litigation plaintiff whose attempt to insert a "carve-out" of the Benefit Litigation into the general release was rejected; who heard from Human Resources that the general release "definitely affects the Benefit Litigation"; and who was informed by her lawyer that the release certainly bars participation in the Benefit Litigation. Those distinctions are relevant under the old individualized standard; they are irrelevant under the new group standard.

prescribe an adequate one.'" Roundtable Br. at 14, quoting *Cirillo v. Arco Chemical Co.*, 862 F.2d 448, 452 (CA3 1988). Put another way, the winning argument was that form releases affecting large numbers of laid off workers—which modern corporations routinely rely upon as a part of mass workforce reductions—should trump individualized process.

Respondents and their *amicus* have successfully persuaded the Second Circuit to undertake a stark shift in existing jurisprudence that contravenes ERISA's primary aim of protecting pension benefits for working Americans. Given the "millions of employees across the Nation [who] have entered into release agreements with their employers," Roundtable Br. at 10, this shift presents an issue of extraordinary importance—particularly in today's economic climate. Further review is warranted.

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLUTION OF THE QUESTION PRESENTED.

1. It is settled law that determination of whether a release of pension benefits was "knowing and voluntary" must be done pursuant to an individualized inquiry. *See* Section I, *supra*. This is not surprising given the text, history, and purpose of the ERISA statute.[20]

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[20] 29 U.S.C. § 1001(a) explicitly provides that the purpose of ERISA is to provide "safeguards" and "minimum standards" to ensure the "equitable character" of benefit plans. An individualized inquiry, and the heightened protection it affords, is consistent with the statute's own recited aim. The more searching an inquiry, the smaller the risk that an employee may unknowingly waive his right to a pension. A group standard, in

In deciding the Question Presented, the Second Circuit reached the opposite conclusion. This case is an ideal vehicle for resolution of the Question Presented because its resolution by the court of appeals below was outcome determinative. And, as explained below, it was outcome determinative for the very same reasons that its application will likely be so in future cases.

2. Mass layoffs are a fact of modern life. But the circumstances of the terminated individuals differ greatly. Such differences are unquestionably relevant when determining whether a given employee knowingly and voluntarily waived his or her pension benefits. The decision below illustrates precisely how the application of a group standard ignores crucial differences among the affected individuals and, in so doing, uses an invalid proxy to resolve the outcome determinative question—whether each individual understood that he or she was waiving his or her claim to pension benefits. The following three examples are illustrative:

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contrast, may have the benefit of expediency, but it makes more difficult the task of accurately determining whether an individual releaser in fact knowingly and voluntarily waived pension benefits. An expedient but less precise standard for whom the cost of imprecision is an increased chance that employees will unknowingly relinquish benefits decreases, rather than increases, the "equitable character" of pension promises, and thus cannot possibly be squared with ERISA's remedial purpose. Indeed, some commentators have gone even further, invoking ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), to urge that a strict reading of ERISA's text suggests *any* waiver of accrued pension benefits is *per se* barred. Albert Feuer, *When are Releases of Claims for ERISA Plan Benefits Effective?*, 38 J. MARSHALL L. REV. 773 (2005).

3. First, the group standard does not take into consideration the specific interaction between the party signing a release and individuals at the company who drafted the document. This case is a paradigmatic example: the Release Petitioners (as is customary in mass layoffs) did not all work in the same division, office, or even State. As such, different Release Petitioners would have spoken to different Human Resource personnel to shore up their understanding of the release's content and effect. The information conveyed to each Release Petitioner (and by whom) are important facts that would be brought to light through an individualized inquiry. Such details are highly relevant in assessing whether each Release Petitioner actually knew that he or she was waiving the pension benefits at issue in the Benefit Litigation.

Second, the group standard does not take into consideration other contextual facts. Again, this case illustrates the danger of such omission. Several Release Petitioners signed their releases only *after* (1) other Benefit Litigation plaintiffs inserted "carve-outs" of the litigation into their releases, and (2) after Xerox had accepted those "carve-out releases" *without* a corresponding reduction in severance consideration.[21]

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[21] For example, plaintiff Charles Zabinski executed a release, with a "carve-out" of this litigation, on September 14, 2005. Pet. App. 70a, ¶5. (Mr. Zabinksi's "carve-out" release was before the court of appeal at A1043-44.) Pursuant to Xerox policy, Zabinski received a salary-continuance severance based on his "length of service," with no input from the Xerox Plan Administrator regarding Zabinski's lawsuit. Defendants' Rule 56 Statement, Pet. App. 77a, ¶¶11-12. Zabinski's severance was not reduced (nor has Xerox ever suggested it was) because he inserted a lawsuit carve-out. *Id.* Several Release Petitioners, such as Charles Hobbs and

Had Xerox believed that the Benefit Litigation *was* covered by the general language of the release, then presumably it would have reduced by some amount the severance provided to the "carve-out" releasors. But Xerox did not do so. Release Petitioners who were *in fact* aware that the Benefit Litigation carve-out language had previously been accepted by Xerox without a corresponding reduction in severance may have concluded that *Xerox itself* interpreted the general release to *not* encompass the Benefit Litigation. Such an understanding would not be a "knowing and voluntary" waiver of an ERISA claim. The court of appeal's resolution of the Question Presented prevents inquiry into such critical facts.

Third, the group standard does not take into consideration the specific education and business experience of individual releasors. This information is of critical importance in determining the particular understanding of each individual: a release readily comprehensible by a division manager might not have been understood by an administrative assistant. Again, this case illustrates the critical importance of such an inquiry. Here, federal judges could not agree about which claims were definitely encompassed within the scope of the release. *Compare* Pet. App. 40a (where the district court concluded that "the releases are at the very least ambiguous as to what the employee was giving up in exchange for salary continuance"), *with* Pet. App. 22a ("the District Court's interpretation of the release forms is incorrect [and] cannot stand.").

Kenneth Pietrowski, signed their releases after Zabinski. *See, e.g.*, Hobbs Release, Pet. App. 67a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 ALCALÁ PARK
Warren Hall
San Diego, CA 92110
(619) 260-2347

BRENDAN S. MAHER
Counsel of Record
PETER K. STRIS
STRIS & MAHER LLP
1920 Abrams Pkwy, #430
Dallas, Texas 75214
(214) 224-0091

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